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IN THE

SUPREME COURT OF THE UNITED STATES

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No. 270

ILO VANDERBOOM, DeHAAN LIVESTOCK & GRAIN FARMS, INC., ANDY D. DeHAAN, KENNETH J. DeHAAN, LYLE R. DeHAAN, H. T. RINGLING, JAMES NACHTIGAL, ROBERT CARTER, R. S. MISKIMINS, RICHARD ADAMSON, WENDELL FOXLEY, JAMES KLAUDT, DONALD O. NACHTIGAL, WILLIAM NASH, ERVIN R. ORTMAN, HERBERT W. ORTMAN, STANLEY W. WEILAND, and INVESTORS THRIFT CORPORATION, an Arkansas Corporation,
Petitioners,

vs.

SAM SEXTON, JR., JAMES S. HALL, AUSTIN GATLIN, DIAMOND G RANCH, INC., an Arkansas Corporation, TEXAS CAPITAL CORPORATION, a Texas Small Business Investment Company,
Respondents.

BRIEF AND ARGUMENT

Of Respondents in Opposition to Petition for Writ of Certiorari

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STATEMENT OF THE RESPONDENTS

Respondents respectfully take exception to petitioners' characterization of the facts which purportedly give rise to their justification in seeking certiorari and a review of the lower Courts' decisions in this case. The well considered opinions of the lower Courts recite the basic, operative and material facts which were uncontroverted. Since petitioners have not included the pertinent facts on which the lower Courts' decisions were based, this Court's attention is invited to those decisions. **Vanderboom, et al. v. Sexton, et al.**, 294 F. Supp. 1178 (W. D. Ark. 1969); **Vanderboom, et al. v. Sexton, et al.**, 422 F. 2d 1233 (8th Cir. 1970).

This Court has earlier denied certiorari in a companion case, **City National Bank v. Vanderboom, et al.**, 290 F. Supp. 592 (W. D. Ark. 1968), affirmed 422 F. 2d 221 (8th Cir. 1970), cert. denied, June 22, 1970, No. 1483. No useful purpose could be served by detailing the undisputed material facts upon which the decisions of the lower Courts were based, but a review of those decisions and the companion case will identify the proper and significant facts to be considered.

Petitioners present two questions for review: (1) The lower Courts erred in holding that only the petitioner, Investors Thrift Corporation (ITC), has a cause of action against respondents under SEC Rule 10b-5; and (2) The lower Courts erred in applying to the 10b-5 cause of action the two-year period of limitation contained in the Uniform Securities Act as adopted in Arkansas because petitioners contend that this selection conflicts with decisions of other Courts of Appeal.

REASONS FOR DENYING THE WRIT

1. Class Protected and Class Obligated—Privity Requirement: Does a Securities Purchaser, Who Purchases in Reliance Upon Material Misrepresentations and Non-Disclosure of Third Party Insiders to the Transaction, Have a Rule 10b-5 Action Against the Third Parties?

Neither respondents nor petitioners take issue with the decision of the Court of Appeals below which held that Investors Thrift Corporation (ITC) could maintain a Rule 10b-5 action within certain limits set forth in the opinion. Review of the lower holding on the "standing to sue" issue is sought by the remaining petitioners, shareholders of ITC, and in the response on this point the collective term, "petitioners" is meant to include all but ITC.

The petitioners stand in the same position as they stood in the companion case, **City National Bank v. Vanderboom**, *supra*. This fact is admitted at page 13 of their petition. Petitioners' contention on this point was decided adversely to them by the Eighth Circuit Court of Appeals and certiorari was denied by this Court on June 22, 1970, in Cause No. 1483. It is submitted that the operative facts are decisive, and that the petitioners have no cause of action, in their own right, under Rule 10b-5.

The lower Court's decision on this point was based upon uncontroverted material facts and particularly the admitted lack of purchaser-seller relationship between the petitioners and respondents.

The decision below is consistent with **Brown v. Bullock**, 194 F. Supp. 207 (S. D. N. Y., 1961), aff'd without discussion of this point, 294 F. 2d 415 (2nd Cir., 1961), in holding that privity is not an ultimate or an operative fact, but rather an evidentiary fact to be considered in conjunction with other material facts in determining the relationship, if there is one, between the plaintiff and the defendant and the exact nature of particular acts and transactions which may involve a duty created by the statute. The Court of Appeals properly concluded that the privity requirement was not met, and the operative facts[1] did not as a matter of law place the remaining petitioners within that group protected by the statute or Rule 10b-5.

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[1] As stated by the lower Court at page A-16 of petition:

"If any recovery is had in this case because of fraudulent concealment of material facts or misrepresentation in the sale of the securities, the right of action runs to the purchaser, ITC, of which the South Dakota appellants constitute only one class of stockholders, owning only non-voting stock. The voting stock of ITC was owned by Markham who is not a party in this suit and who was in active control of the corporations purchased by ITC from September 9, 1965, until their financial demise. Thus, we feel that ITC is the only proper party plaintiff on the 10b-5 claim."

2. Conflicting Application of Limitation of Actions Provisions: Should Defrauded Securities Investors in Interstate Commerce Be Prevented From Maintaining a Rule 10b-5 Action Because of Uncertainty Created by Conflicting Decisions of United States Courts of Appeals as to the Characterization of a Rule 10b-5 Action and as to the Basis for Selection of the Applicable Statute of Limitations?

The real question here under consideration is whether or not there exists a conflict among the circuits in the application of limitations of action provisions. A careful reading of each of the cases cited by petitioners, most of which were considered by the Courts below, reflects that the Federal Courts must apply the most appropriate state law or statute in determining which limitations period will govern. The different time periods selected are the result of differences in state law and not because of a conflict among Circuits.

The cases cited by petitioners turned on factors such as (1) agreements of the parties that a particular statute of limitations would apply, or (2) the choice between a common law fraud statute of limitations versus a limitations period for actions created by statute.

The Eighth Circuit most ably stated in its opinion (A3-8) its reasons for holding the applicable statute of limitations to be applied is that of Arkansas in its Uniform Securities Act (Ark. Stats. Anno., Section 67-1256), where the period is two years:

That there may be different results reached among the circuits on factually similar cases is attributable to the settled rule that the governing period of limitation in actions brought under Federal statutes which contain no express period is that period of the forum state deemed

to be most appropriate. The appropriate laws of the various states may produce different results, but the circuits are consistent in the approach to the problem of limitations.

In **Charney v. Thomas**, 372 F. 2d 37 (6 Cir. 1967), the choice was made between the Blue Sky limitation period and the common law limitation period. As so carefully pointed out by Judge Gibson, writing for the lower court here, **Charney** is distinguishable. In **Charney**, it was determined that the Rule 10b-5 action was more closely related to the common law fraud action than to the Michigan Blue Sky violation action. However, **Charney** specifically disclaimed that its holding would govern in other cases in other states. Speaking at p. 100 of 372 F. 2d, the Court stated:

> "Although in some cases the local Blue Sky Laws might be the more appropriate point of reference, in the present case the Michigan [common law period is more appropriate] . . ."

The Eighth Circuit carefully examined **Charney** and the other cases cited by petitioners, and determined that in the instant action, the appropriate limitation period to apply to Rule 10b-5 actions was that of two years as set out in the Uniform Securities Act of Arkansas. This conclusion is based upon a factual determination of appropriateness by the Court, and does not conflict with any other decisions by that court or of the Arkansas courts.

This Court has said it will not re-examine questions of local law as applied by the lower courts. **Skelly Oil Co. v. Phillips Petroleum Co.**, 339 U. S. 667, 674 (1950).

CONCLUSION

The Courts below did not generally limit the scope of protection afforded by the statutes and rules herein applicable by requiring privity between purchaser and seller,

but rather held that on the facts as presented, the purchaser, Investors Thrift Corporation, was the only proper party to seek relief under the statutes and rules.

The Courts below properly determined that the appropriate limitation period for Rule 10b-5 actions in Arkansas was two years based upon that State's Uniform Securities Act. This conclusion is nothing more than a determination of the appropriate application of the Arkansas limitation period. It does not in any way conflict with other circuits, but rather applies the appropriate law to a particular set of facts. This was correct judicial procedure according to the applicable State and Federal laws. The writ should be denied.

Respectfully submitted

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